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Brief of Defendant - Appellees in *Environmental Defense Fund v. TVA*, No. 73-8174

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOCKET NO. 73-8174

ENVIRONMENTAL DEFENSE FUND, ET AL.

Plaintiffs-Appellants

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

Defendants-Appellees

On Appeal from the United States District Court
Eastern District of Tennessee, Northern Division

BRIEF OF DEFENDANTS-APPELLEES

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COUNTERSTATEMENT OF THE CASE

TVA is dissatisfied with plaintiffs' statement of the case because it fails to describe either the reasons for the Tellico project and the benefits which will result from it, or the state of its completion. We believe these matters are of vital importance to an understanding of the case.

Major benefits from the project include navigation, flood control, electric power, recreation, enhanced employment,

and other general economic benefits. TVA estimated that its construction would result in private investment of $265,000,000 in new industry in the Tellico area over the next 25 years, creating some 6,600 new jobs in three economically depressed east Tennessee counties which have been plagued by unemployment, low income levels, and mass out-migration of their young people. The total annual benefits are estimated at $7,410,000, which includes the following major items: navigation $400,000, flood control $505,000, electric power $400,000, recreation $1,440,000, and enhanced employment $3,650,000. The uncontradicted evidence was that in March of 1973, during a single flood, the Tellico project, had it been completed, would have averted flood damages of over $15,000,000 to the City of Chattanooga alone.

Construction on the project began in March 1967, and is now one-half complete. To date over $45,000,000 has been appropriated toward its completion--currently estimated to cost $69,000,000--and over $35,000,000 has been spent. The concrete portion of the dam has been completed; various roads and bridges have been relocated and constructed; 80 percent of the land for the project has been acquired; and most of the families who lived in the project area have moved.

Plaintiffs' statement of the case also includes a discussion of the historical aspects of the area which is grossly exaggerated. There are no Indian villages within

the project area, only former sites which were abandoned over 200 years ago. The undisputed evidence and the EIS show that these sites received no attention from the state, federal or local authorities, the Indians, or anyone else prior to the Tellico project, whereas as a part of the project activity a great deal has been done to locate and preserve evidence of the Cherokee past which might otherwise have been lost. See EIS I-1-8, 9; I-1-35-38; I-3-51; and II-9-1-5 and discussion infra, pages 29-32. Also, although plaintiffs point out that the present State Administration is on record as favoring abandonment of the project, they fail to point out that the undisputed proof showed that the two previous State Administrations not only favored the project but actively urged congressional funding of it. It was not until after $30,000,000 had been expended that the new State Administration opposed the project. Additionally, plaintiffs fail to point out that the residents of the three-county area in which the project is located are overwhelmingly in favor of it as are their elected officials and the present Tennessee House of Representatives. On March 15, 1973, the Tennessee House of Representatives adopted a formal resolution on behalf of "all the people of Tennessee" endorsing the project and urging its early completion. This resolution was filed as Exhibit 71.

The environmental statement for the Tellico project, which was filed with CEQ on February 10, 1972, and which is

the subject of this lawsuit, contains over 600 pages. During the four-day trial before the Honorable Robert L. Taylor, 18 witnesses testified and 130 exhibits were received in evidence. After receiving post-trial briefs, Judge Taylor entered a 27-page memorandum holding that the preliminary injunction he had previously granted should be dissolved, and stating in part:

> In dissolving the injunction against proceeding with the Tellico project, we have found that TVA has now complied with NEPA. The final impact statement discloses the significant impacts to result from the project and discusses the reasonable alternatives available. There has been on the part of TVA in reaching its decision a good faith consideration and balancing of environmental factors. An attempt has been made to mitigate certain of the environmental losses inherent in proceeding with the project. Further, we have concluded that according to the standards set forth in sections 101(b) and 102(1) of NEPA the actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values [Memorandum, pp. 26-27].[1]

On November 1, 1973, the court entered final judgment for TVA, saying:

> . . . defendants have complied fully with the provisions of the National Environmental Policy Act of 1969 and all other applicable laws at issue with regard to the Tellico Dam Project, that all relief sought by plaintiffs should be denied, the preliminary injunction entered herein on January 11, 1972, dissolved, the case dismissed, and judgment entered for the defendants; it is therefore Ordered that judgment be and it hereby is, entered for the defendants in

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1 Emphasis added herein unless otherwise noted.

accordance with the memorandum opinion herein filed; that the preliminary injunction previously entered herein be and it hereby is dissolved; that the action be, and it hereby is dismissed . . . .

ARGUMENT

Introduction

Plaintiffs' brief, in our view, consistently confuses issues of fact and law, and summarizes testimony of plaintiffs' witnesses without making clear that such testimony was contradicted by witnesses for TVA. The district court expressly found that TVA's final environmental statement was a "detailed statement" within the meaning of NEPA--i.e., that it discusses adequately the five subject areas specified in section 102(2)(C) of NEPA; that TVA considered, and the EIS discusses, the reasonable alternatives available; that TVA reached its decision to proceed with the project after a good-faith consideration and balancing of environmental factors; that TVA had attempted to mitigate environmental losses; and that the actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values.

These are essentially factual issues involving expert opinions, and are basically what the trial was all about. Witnesses for each side testified at length on various aspects of these issues, and the district court made its

findings after considering their testimony as well as the exhibits. In such circumstances, it is hornbook law, as expressly stated in Rule 52 of the Federal Rules of Civil Procedure, that:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

See also Zenith Corp. v. Hazeltine, 395 U.S. 100 (1969); J. A. Jones Constr. Co. v. Englert Eng'r. Co., 438 F.2d 3 (6th Cir. 1971); National Labor Relations Board v. S. E. Nichols, 472 F.2d 1228 (6th Cir. 1972). As said in Zenith Corp., supra:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed" [395 U.S. at 123].

With this basic principle in mind, we turn to the specific points raised in plaintiffs' brief.

I

The District Court Did Not Err with Respect to the Standard of Review.

Plaintiffs argue that Judge Taylor did not apply the proper standard of review as to the economic benefit and cost analysis. They say he should have applied the standard adopted by the Eighth and Fourth Circuits, but failed to do so. In this they are mistaken. Judge Taylor did apply the standard of the Eighth and Fourth Circuits, but that standard is not what plaintiffs say it is. Plaintiffs have failed to discuss the latest cases from these circuits or to recognize the distinction which these circuits have clearly drawn between the analysis of economic benefits and costs required under Senate Document No. 97, 87th Cong., 2d Sess. (Exhibit 56 in this case), and the analysis of environmental factors required under NEPA. There is a fundamental difference between the two types of analyses, but plaintiffs have scrambled the two together as though they were the same.

In water related projects (such as Tellico) federal agencies are confronted with two different types of benefit and cost analyses--an economic (dollar and cents) analysis under Senate Document No. 97, and a broader environmental (good versus bad) analysis under NEPA. The purpose of the economic analysis under Senate Document No. 97 is to allow the executive and legislative branches to make informed

judgments as to the desirability of a water resources project before money is appropriated for its construction. The basic theory underlying this type of analysis is that the Office of Management and Budget will not recommend, and Congress will not make, an appropriation of money for such a project unless it is satisfied that the economic benefits exceed the costs. TVA made such a benefit-cost analysis of Tellico before Congress authorized the project by making the initial appropriation for it. This economic analysis under Senate Document No. 97 is wholly different and apart from the environmental analysis required by NEPA, and this difference is recognized by the courts. The general rule is that the courts will not review the economic analysis made under Senate Document No. 97 because that is a legislative matter for Congress.

Contrary to what plaintiffs suggest in their brief, the Eighth and Fourth Circuits apply a different standard of review with respect to economic analysis under Senate Document No. 97 than they do with respect to the environmental analysis under NEPA. Plaintiffs rely upon the decision in the Gillham Dam case, Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), cert. denied, 5 ERC 1416 (1973). That case did not deal with economic costs and benefits under Senate Document No. 97, but only with the environmental analysis under NEPA. The decision shows on its face that plaintiffs' claim for review of economic costs and benefits was dismissed by the district

court, which decision was affirmed by the Eighth Circuit. Indeed, the district court decision by Judge Eisele in that case states specifically that economic costs and benefits under the Flood Control Act (33 U.S.C. § 701(a)), as implemented by Senate Document No. 97, are not subject to judicial review:

> . . . The Court does not believe that the plaintiffs have stated a claim for which relief can be granted under its "Fourth Cause of Action" based upon 33 U.S.C. § 701(a). It is for the Congress to determine, in authorizing such a project and in, thereafter, making subsequent appropriations therefor, whether the benefits are "in excess of the estimated costs." The Court does not believe that it has the authority to enjoin the expenditure of appropriated funds upon a showing that the benefits are less than the estimated cost. The plaintiffs and others are free to bring such matters to the attention of the legislative branch at the time any new appropriation for this project is proposed. Indeed, they could bring the matter to the attention of Congress at this time with the hope of obtaining legislation which would prevent the expenditure of funds already appropriated (which would obviously include those needed for the construction of the dam proper and the clearing of the lake). The methods of calculating cost-benefit ratios are innumerable and in many cases esoteric. The Court's judgment as to sound procedures in this regard might well not be in accord with the judgment of Congress. And, as stated above, the Court does not believe it should, in any event, attempt to substitute its judgment for that of the legislature [Environmental Defense Fund v. Corps of Eng., 325 F. Supp. 728, 739-40 (E.D. Ark. 1971); emphasis by the court].

In a later case involving the Cache River, Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972),

the Eighth Circuit had before it the question of the standard of review applicable both to the general NEPA analysis and the economic analysis under Senate Document No. 97. As to the NEPA analysis, the court applied the earlier Gillham Dam standard, saying:

> We held in Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, supra at 397, that District Courts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA.
>
> The review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave insufficient weight to environmental factors. Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, supra.
>
> We caution, as we did in Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, supra at 300, that:
>
> "* * * Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."
>
> Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 [2 ERC 1250] . . . (1971) [pp. 352-53].

As to the standard of review applicable to economic benefits and costs, however, the court applied a wholly different rule:

> The complaint specifically alleges that the costs exceed the benefits for this project and that the lives of people would be adversely affected by the project's completion. However, this project was authorized many years ago by Congress on the basis of its determination that the benefits of the project exceed the costs. We do not think that the statement of policy in § 701a can be used as a vehicle for continuing evaluation of the project by the courts.
>
> We point out, however, that the relief requested by the plaintiffs under § 701a is partially available under NEPA. To fully comply with NEPA, the Corps must reappraise the costs and benefits of the project in light of the policies of environmental protection found in NEPA. As we have stated, a decision to proceed with channelization is reviewable in the District Court to determine whether the actual balance of costs and benefits struck by the agency according to the standards of §§ 101 and 102 of NEPA was arbitrary or clearly gave insufficient weight to environmental factors [473 F.2d at 356].

The rule in the Fourth Circuit is the same, and is stated by Judge Dalton in Cape Henry Bird Club v. Laird, 5 ERC 1283 (W.D. Va. 1973), aff'd "on the basis of the district court's opinion," ___ F.2d ___ (4th Cir., Sept. 18, 1973), as follows:

> The sole purpose of NEPA is to ensure that the environmental effects of a project are given full and adequate consideration by the decision maker.
>
> Calculations of B/C ratios under the Flood Control Act and under NEPA are different. With respect to the Flood Control Act, the Senate passed a document entitled "Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for the Use of Water and Related Land Resources", S.Doc. No. 97, 87th Cong., 2d Sess. (1962). This document sets forth in detail the

> procedures and criteria which various agencies must use to determine the B/C ratio of a project. It has been held that because of the innumerable number of methods of deriving them, B/C ratios, computed under 33 U.S.C. § 701a, are not judicially reviewable, but are solely a matter for Congressional determination. United States v. West Virginia Power Co., 122 F.2d 733 (4th Cir. 1941), cert. denied, 314 U.S. 683 (1941); Sierra Club v. Froehlke, ____ F.Supp. ____ [5 ERC 1033] (S.D. Tex. 1973); Environmental Defense Fund v. Corps of Engineers of the United States Army, 325 F.Supp. 728, 740 [2 ERC 1260](E.D. Ark. 1971), aff'd, 470 F.2d 289 [4 ERC 1721](8th Cir. 1972).
>
> The method of determining B/C ratios under NEPA is much broader than under Senate Document No. 97. Costs which a court might determine should be included under NEPA standards, might not be included under the Congressional standards of Senate Document No. 97. In the court's opinion the NEPA B/C ratio, rather than itself being the determining or deciding factor in cases brought under NEPA, is to be used only to enable the court and other decision makers to determine whether all environmental factors of a project have been given full and adequate consideration.
>
> Because Congress has authorized the Gathright project, it has determined that the project met the criterion set forth in 33 U.S.C. § 701a. Even if under NEPA, costs might exceed the benefits, this court does not believe that such reason would be authority to stop the project. If the plaintiffs believe that B/C ratios should be computed using NEPA standards, then they should make their views known to Congress. . . . With respect to these proceedings the B/C ratio is important only to determine whether or not the environmental factors have been properly and adequately considered [5 ERC at 1287-88].

Judge Taylor applied the same standard of review in the present case as the Fourth and Eighth Circuits did in

the cases cited above. As to the NEPA review, he quoted the Eighth Circuit's decision in Gillham Dam, saying:

> This Court, therefore, must decide whether NEPA gives plaintiffs the right to challenge the decision to continue with the project as designated. We conclude that it does.
>
> After initially limiting review to an agency's procedural compliance, several circuits began recognizing the right of plaintiffs within limits to attack the underlying decision.[30] A leading case, acknowledging this right and defining the standard of judicial review, is Environmental Defense Fund v. Corps of Eng., U. S. Army, 470 F.2d 289 (8th Cir. 1972). There the Court held that:
>
> "When NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The Court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.' [Citing Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971)]" (Emphasis added)
>
> at pg. 300
>
> The Court cautioned that:
>
> ". . . although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. [Citing, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)]."

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30 Environmental Defense Fund v. Corps of Eng., U.S. Army, 470 F.2d 289 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 664 (4th Cir. 1973) [Memorandum, pp. 22-23].

As to the economic review, Judge Taylor relied upon and followed the Eighth Circuit's decision in the Cache River case, and the view of the Fourth Circuit as expressed by Judge Dalton in the Cape Henry Bird Club case. Judge Taylor stated the rule as follows:

> Calculation of the B/C ratio required under the Flood Control Act of 1936 and Senate Document No. 97 has almost uniformly been denied judicial review. United States v. West Virginia Power Co., 122 F.2d 733 (4th Cir. 1941); cert.den. 314 U.S. 684 (1941); Environmental Defense Fund v. Corps of Eng. of U. S. Army, 325 F.Supp. 728 (E.D. Ark. 1970), aff'd, 470 F.2d 289 (8th Cir. 1972), cert.den. 5 ERC 1416 (1973); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1973); Environmental Defense Fund v. Corps of Eng. of U. S. Army, 348 F.Supp. 916, 924 (N.D.Miss. 1972); Cape Henry Bird Club v. Laird, 5 ERC 1283 (W.D. Va. 1973); contra, Montgomery v. Ellis, et al, Civil Action No. 71-644 (N.D.Ala. September 11, 1973).
>
> We do not view the test enunciated by the Eighth Circuit as encompassing a complete review of all economic factors involved in a project. Matters such as the projected electric power benefits, flood control benefits, etc. and whether their computation conforms to the requirements of Senate Document No. 97 are legislative matters and not reviewable.[31]

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31 Dr. Roberts' testimony concerned almost exclusively matters that we find unreviewable under NEPA. He stated inter alia that the project benefits and costs, the discount rate, project life and secondary benefits were all arbitrarily calculated. As said in Environmental Defense Fund v. Corps of Eng. of U. S. Army, 325 F.Supp. 728:

". . . It is for the Congress to determine, in authorizing such a project and in, thereafter, making subsequent appropriations therefor, whether the benefits are 'in excess of the estimated costs.' The Court does not believe that it has the authority to enjoin the expenditure of appropriated funds upon a showing that the benefits are less than the estimated cost. . .

* * * * *

". . . The methods of calculating cost-benefit ratios are innumerable and in many cases esoteric. The Court's judgment as to sound procedures in this regard might well not be in accord with the judgment of Congress. And, as stated above, the Court does not believe it should, in any event, attempt to substitute its judgment for that of the legislature."

We reject plaintiffs attempt to revive review of these matters by way of NEPA's substantive review process. Cape Henry Bird Club v. Laird, 5 ERC 1283 (W.D. Va. 1973) [Memorandum, pp. 24-25].

In the very next paragraph of his opinion, Judge Taylor makes it crystal clear that he did in fact conduct the "partial" review required by the Eighth Circuit rule as stated in Cache River. He says specifically:

Although in denying review of the economic computations under Title 33 U.S.C. § 701, we note, as did the Eighth Circuit in Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972), that partial review is available under NEPA. In order to fully comply an agency "must reappraise the costs and benefits of the project in light of the policies of environmental protection found in NEPA." (Emphasis added). Hence, any environmental benefits claimed by an agency may be scrutinized by this Court as it reflects upon whether the costs and benefits struck were arbitrary according to the standards set forth in sections 101 and 102 of NEPA.

> We have examined the testimony and exhibits presented in this case along with the arguments propounded by both parties and conclude that defendants' decision to proceed was not arbitrary. In reaching this conclusion, this Court is mindful of the narrow scope of its review. We have also taken into consideration that the project was authorized several years prior to the passage of NEPA, and almost $35,000,000 has been expended on the project. Environmental Defense Fund v. Corps of Eng., U. S. Army, 470 F.2d 289, 301 (8th Cir. 1972).
>
> * * *
>
> . . . Further, we have concluded that according to the standards set forth in sections 101(b) and 102(1) of NEPA the actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values [Memorandum, pp. 25-27].

With reference to the testimony of Drs. Roberts and Carroll, we wish to point out that their testimony was contradicted by that of Dr. M. I. Foster, Director of TVA's Division of Navigation Development and Regional Studies, and Reed Elliot, Director of TVA's Division of Water Control Planning. Dr. Foster, who was Dr. Carroll's former supervisor, holds a doctor's degree in economics from the University of Florida. Mr. Elliot had the responsibility for preparation of the project planning report for the Tellico project. Both of these men have had extensive experience in computing benefit-cost ratios under Senate Document No. 97. They both testified, and the EIS so states (EIS III-3-1, etc.), that the benefit-cost analysis of this project was made in accordance with Senate Document No. 97 and the Rules and Regulations promulgated by the Water Resources Council,

which of course reflect national policy with respect to such projects. While it is neither possible nor desirable to attempt a review of the enormous mass of evidence introduced at the trial on this issue, it may be helpful in understanding the district court's decision to make a few pertinent comments on that evidence and the court's remarks with respect to it.

As the court noted in its opinion:

> Much of plaintiffs' proof centered on the economic aspects of the project. . . .
>
> * * *
>
> We can scarcely imagine a more satisfactory disclosure than that contained in final statement. Beside the summary of economic information and responses to comments, the entire third volume presents detailed economic discussion of the project both pro and con. A study entitled the Tennessee Valley Authority's Tellico Project: A Reappraisal is reprinted in full. This one hundred and six page document was prepared by a group of faculty members and students of The University of Tennessee. It investigated three economic aspects of the Tellico Project with emphasis on the method of estimating the flow of benefits and costs resulting from the investment. TVA in the final part of the statement responded to this study. Plaintiffs at trial relied on many of the contentions raised in the report. The treatment afforded the economic aspects of the project in the EIS more than suffices the disclosure requirements of Section 102(2)(C) of NEPA.
>
> * * *
>
> . . . Indeed, by far the greatest amount of testimony on any single topic was given to the debate of the relative economic contentions of the parties [Memorandum, pp. 15, 16, 23].

Moreover, a substantial part of Dr. Roberts' testimony was an attack on Senate Document No. 97 itself. Perhaps

the central thrust of plaintiffs' testimony was that it was arbitrary, unrealistic, and not in accord with sound economic principles for TVA to use a 3-1/4 percent discount rate and a 100-year project life in computing the economic costs and benefits. Yet none of their witnesses testified that the interest rate used was not legal or not in full accordance with Senate Document No. 97 and the regulations of the Water Resources Council. In fact, the evidence was that the 3-1/4 percent interest rate is the rate required for this project by the regulations of the Council issued December 24, 1968, which state that the rate of interest in effect prior to that date (3-1/4%) "shall continue to be used for such project until construction has been completed, unless the Congress otherwise decides" (33 Fed. Reg. 19170 (1968); Ex. 56). Congress has not otherwise decided as to Tellico.

As for the use of a service life of 100 years for the project, this, too, is in full accord with Senate Document No. 97, which states that the economic evaluation of a project shall encompass "the period of time over which the project will serve a useful purpose" and that "100 years will normally be considered the upper limit" (Senate Document No. 97, pp. 11-12). The EIS states that siltation of the reservoir will not be a significant factor "for at least 600 years" and that it would "take about 900 years for the reservoir to fill to

elevation 805" (EIS I-1-12, II-10-2). It is obvious that the useful life of this project will far exceed 100 years.[2]

Finally, as to plaintiffs' contention that the economic benefit-cost analysis should be recomputed to conform to present prices, such a suggestion is not only highly impractical and unrealistic but is not required by the law. Section 101 of NEPA does not require that the economic benefits and costs be recomputed, as plaintiffs suggest. This section merely places upon the agencies "the continuing responsibility . . . to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate" their plans and programs to produce a better environment. TVA did reexamine the project to see if it were still a viable project economically. The EIS states specifically that:

> If the project were to be reevaluated economically today, current benefit values should be used as well as current discount rates and costs. In addition, the most meaningful evaluation would be one that takes into account the fact that a substantial investment has already been made, not one that assumes a situation different from that which actually exists. If

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2 Montgomery v. Ellis (N.D. Ala., Sept. 11, 1973), relied on by plaintiffs, is not in point. It was not disputed that the government agency involved in that case (SCS) used the 1965 interest rate instead of the 1971 rate "employed for current projects" as prescribed by the Water Resources Council; and used a 100-year life for a stream channelization project, although for such a project, use of a 50-year life is customary. The court held that this was arbitrary. In Tellico it was not disputed that TVA used the interest rate prescribed by the Water Resources Council, and that use of a 100-year life for a dam and reservoir project is proper under Senate Document No. 97.

> this were done, project benefits would exceed project costs by a wide margin--on the order of 3.5:1 at a 5-3/8 percent discount rate.
>
> TVA is convinced that the Tellico project has very substantial economic value, that it had such value when originally planned, and that its economic value has increased since the time it was planned. Accordingly, from an economic standpoint, TVA concludes that the project will be a sound and wise investment [EIS III-3-24].

TVA also reappraised the project in the light of the requirements of NEPA.

> TVA has again carefully considered and weighed the economic and environmental benefits and adverse effects of the project and has concluded that benefits far outweigh adverse effects [EIS, Summary Sheet].
>
> In balancing the environmental and economic losses and gains associated with the project, I have concluded that any decision other than to proceed with the project as designed, with the above described modifications, would not be warranted or justified. In my judgment the economic and environmental gains clearly outweigh the losses. In reaching this conclusion I have taken into account all of the official agency comments, comments received from other sources, and reviews of members of the staff, which reviews produced a systematic, interdisciplinary analysis covering both quantified and unquantified environmental amenities and values [TVA General Manager's Review and Balancing Report to the TVA Board, Ex. 128].

Judge Taylor expressly found as a matter of fact that this reappraisal was made in good faith and that TVA's decision to proceed with the project was in full accord with NEPA:

> There has been on the part of TVA in reaching its decision a good faith consideration and

balancing of environmental factors. An attempt has been made to mitigate certain of the environmental losses inherent in proceeding with the project. Further, we have concluded that according to the standards set forth in sections 101(b) and 102(1) of NEPA the actual balance of costs and benefits struck was not arbitrary and gave sufficient weight to environmental values [Memorandum, p. 27].

In the light of what Judge Taylor said and did, it is difficult to understand the basis for plaintiffs' contention that the court applied the wrong standard of review.

II

The District Court Did Not Err in Holding that the Tellico Impact Statement Is Adequate.

The question as to what constitutes an adequate "detailed" statement within the meaning of section 102(2)(C) of NEPA has been extensively discussed by the courts. A brief review of the guiding principles, before discussing the specifics in the case at bar, would seem to be in order.

NEPA is to be construed in a reasonable manner. It requires discussion of only significant impacts. NEPA does not require a perfect impact statement which would satisfy everyone, for that is impossible. As said in Environmental Defense Fund v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark.), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 5 ERC 1416 (1973):

> The environmental impact statement is not to be equated to a trial court record which is examined on appeal by a higher court. Although the impact statement should, within reason, be as complete as possible, there is nothing to prevent either the agency involved, or the parties opposing proposed agency action, from bringing new or additional information, opinions and arguments to the attention of the "upstream" decision-makers even after the final EIS has been forwarded to CEQ. So it is not necessary to dot all the I's and cross all the T's in an impact statement.
>
> Congress, we must assume, intended and expected the courts to interpret the NEPA in a reasonable manner in order to effectuate its obvious purposes and objectives. It is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project [342 F. Supp. at 1217].

Similarly, in Environmental Defense Fund v. Corps of Eng., 348 F. Supp. 916 (N.D. Miss. 1972):

> Thus a § 102 statement must thoroughly discuss the significant aspects of the probable environmental impact of the proposed agency action. By definition, this excludes the necessity for discussing either insignificant matters, such as those without import, or remote effects, such as mere possibilities unlikely to occur as a result of the proposed activity. This criterion not only adheres to the CEQ guidelines but comports with a rule of reason: it does not, however, encompass the necessity for disclosing "all known possible environmental consequences" [p. 933].
>
> The detailed statement required by § 4332(2)(C) must contain such information as will alert the public, other interested governmental agencies, the Council on Environmental Quality, the President, and the Congress of possible environmental consequences of proposed agency action. Section 4332(2)(C) does not require that every conceivable study be performed and that each problem be documented from every

> angle to explore its every potential for good or ill [Sierra Club v. Froehlke, 345 F. Supp. 440, 444 (W.D. Wis. 1972)].

Judge Taylor in Natural Resources Defense Council v. Tennessee Valley Authority, 5 ERC 1669 (E.D. Tenn., July 24, 1973), also stated:

> There is no requirement that an impact statement be replete with maps, charts and other supporting data [p. 1671].

Neither should an EIS be an exhaustive collection of various and sundry minute scientific descriptive details which would likely be confusing to the decision makers and apt to miss the focus NEPA sought to achieve. Environmental Defense Fund v. Corps of Eng., 348 F. Supp. 916 (N.D. Miss. 1972).

The purpose of an environmental impact statement is to assure that environmental factors are given appropriate consideration in the decision making process, along with economic and other considerations. Environmental Defense Fund v. Tennessee Valley Authority, 339 F. Supp. 806 (E.D. Tenn.), aff'd, 468 F.2d 1164 (6th Cir. 1972); Natural Resources Defense Council v. Tennessee Valley Authority, 5 ERC 1669 (E.D. Tenn. 1973). The "ultimate decision [in this case, to complete Tellico] must of course take into account matters other than environmental factors." Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971).

"The sole purpose of NEPA is to ensure that the environmental effects of a project are given full and adequate consideration by the decision maker." Cape Henry Bird Club v. Laird, 5 ERC 1283, 1287-88 (W.D. Va. 1973), aff'd "on the basis of the District Court's opinion," ___ F.2d ___ (4th Cir. 1973).

Plaintiffs contend here that the Tellico impact statement is deficient in that it fails to adequately discuss the following subjects:

1. Shoreline development
2. Agricultural losses
3. Ecological impacts
4. Historical values
5. Water quality

The district court heard extensive testimony of experts on all of these matters and found that the statement was adequate with respect to all of them. We shall discuss each of them in order.

1. Shoreline development. Judge Taylor devotes two and one-half pages of his opinion to this subject (Memorandum, pp. 13-15) in which he documents numerous pages in the statement and the specific exhibits in which this subject is discussed. He also points out that numerous witnesses for each side testified about various aspects of this matter. It would be futile to attempt a summary, or even a meaningful analysis, of the testimony, exhibits, and discussion contained in the environmental statement, except to say that the court heard it all and considered it all in reaching his conclusion

that the statement was adequate. It is significant that plaintiffs concede TVA's "wealth of expertise" in this area (plaintiffs' brief, p. 31). It is obvious that plaintiffs are dissatisfied with the fact that the trial judge did not accept the opinions of their witnesses.

We wish also to make three specific comments concerning this subject. First, it should be noted that the CEQ Guidelines quoted and relied upon by plaintiffs at pages 27-29 were not in effect when the Tellico environmental statement was prepared, nor when the trial was held. They were not issued until August 1, 1973, and provide by their own express terms that they apply only to "draft and final impact statements filed with the Council after January 28, 1974" (Environmental Reporter, p. 71:0308; 38 Fed. Reg. 21265 (Aug. 7, 1973)).

Second, plaintiffs' discussion of the comments of EPA on TVA's draft Tellico statement is grossly inaccurate and misleading. The EPA comments quoted in plaintiffs' brief at page 32, with respect to industrial and commercial development, are taken from EPA's letter of November 12, 1971, and refer to "the Timberlake community" which is a proposed comprehensive planned community within the project area and which is now under study. Timberlake is a wholly separate project for which a separate environmental statement will be prepared, if and when the project is authorized. At present, it is merely under study, and while Congress has appropriated funds for the construction of Tellico it has appropriated

funds only for planning Timberlake. EPA's November 12, 1971, letter quoted by plaintiffs was based on EPA's misunderstanding that "the total [Tellico] project includes the proposed Timberlake Development as an integral component."

In EPA's later letter of January 10, 1972, set out in the EIS at I-3-1, which plaintiffs ignore, EPA recognizes its error and acknowledges that there are two projects--Tellico and Timberlake. Moreover, in a third and later letter of August 7, 1972 (Ex. 61), commenting on TVA's final statement, EPA said in part:

> The Environmental Protection Agency has reviewed the Final Environmental Impact Statement for the Tellico Project. We conclude, as the Statement itself indicates, that completion of the project is likely to result in a substantial alteration of the environment through the long-term impacts of recreational, residential, and industrial development associated with the project and designated as Timberlake by TVA.
>
> We would be quick to acknowledge and congratulate you and your able staff on the evidence of fine performance demonstrated in preparing and finalizing this Environmental Impact Statement.
>
> As pointed out in our letter dated January 10, 1972, EPA suggested that TVA prepare an overview statement to provide the necessary perspective against which the environmental effects and alternatives could be assessed for the Tellico Project and the proposed Timberlake development. Again, we would like to acknowledge and compliment TVA in that the Final Statement does contain additional material concerning both of these projects; however, the Final E.I.S. addresses in the main, the construction of Tellico Dam and not the further detailed assessment of possible environmental problems which might arise from locating certain major industrial categories

in the proposed Timberlake development and the larger concentration of people and associated activities contemplated. The impact of urban runoff and other effects, even with compliance with State and Federal environmental standards, may be significant. These effects could be the basis for more stringent standards that TVA may want to impose. Such standards obviously could affect the promised potential of the Timberlake development.

We recognize that TVA, as well as many other Federal agencies, labor under a lack of clear direction as to how much environmental assessment in an environmental impact statement is sufficient. The issue to a large extent revolves about what is a complete project and what is part of a project. . . .

* * *

In concluding these comments, we wish to expressly extend to TVA our appreciation for your spirit of cooperation and willingness to discuss and demonstrate this project. We look forward to a continued close working relationship which can only act as a benefit for the environment and mutually support our common goal of enhancement of the environment for all Americans.[3]

Third, the comments of the Appalachian Regional Commission on TVA's draft statement, which plaintiffs quote at pages 33 and 34 of their brief, reflect the Commission's similar lack of understanding that the Tellico project and Timberlake are two separate projects, and that a separate environmental statement will be prepared for Timberlake if it is undertaken.

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3 Plaintiffs' statement on page 33 of their brief that Mr. Tidwell testified that "in the opinion of EPA" the Tellico EIS did not give sufficient consideration to the impacts of shoreline development is untrue.

2. Agricultural losses. At page 35 of their brief, plaintiffs complain that the district court "apparently disregarded" the testimony of their witness Mr. Robert Sliger about the agricultural losses which would result from the project, as for example, "$290 per acre for corn, $1,400 per acre for tobacco and $3,200 per acre for tomatoes." We do not think it is fair to say that Judge Taylor "disregarded" this testimony, but rather that he took it into consideration along with the rebuttal testimony of Dr. M. I. Foster, TVA's Director of Navigation Development and Regional Studies, and the discussion contained in the environmental statement (EIS I-1-31; I-1-42; I-1-47; I-3-15; I-3-26 through 27; and I-3-105).

3. Ecological impacts. Plaintiffs' contentions that the final EIS does not contain a sufficient discussion of the ecological impacts are unfounded. They rest their argument on the testimony of their witness Dr. Clebsch and the comments of the Department of the Interior on the draft statement.

The short and simple answer to plaintiffs' argument is that Dr. Clebsch's testimony was rebutted and contradicted by the testimony of several other witnesses, and that the comments of the Department of the Interior were addressed to TVA's draft statement and not to the final statement. The draft statement contained only 27 pages, whereas the final statement contained over 600 pages. Moreover, both the

> Tennessee, who is in charge of the salvage surveys and excavations of the area, testified that he has reviewed the EIS and feels that it contains an objective detailed discussion of the significant impacts of the project concerning this topic. The controversy in this area concerned the emphasis to be placed on the loss. Little evidence was presented demonstrating a lack of disclosure on the part of TVA or a lack of objective analysis of the loss. We find the impact statement's discussion of the historical and archaeological impact resulting from the project to be adequate [Memorandum, pp. 8-9]

The three nationally known archaeologists who reviewed the EIS and are referred to by the district court are Dr. John Otis Brew of Harvard; Dr. John M. Corbett of Columbia (former Chief Archaeologist of the National Park Service); and Dr. Robert L. Stephenson of the University of South Carolina (former Head of River Basin Surveys for the Smithsonian Institution). Their impressive qualifications are set out in Exhibit 104, along with their report, which states in part:

> We consider the statement and supporting data to be sound and well written. We feel that this is an excellent, detailed statement which, together with the supporting material, gives an accurate and comprehensive treatment of this aspect of the impact of the project [Memorandum, p. 7].

That Judge Taylor did not treat this matter lightly, as plaintiffs would have this Court believe, is shown by the fact that his memorandum opinion makes specific reference to the fact that these matters are discussed (see footnotes 5, 6, 7, 8, 9, and 10 of memorandum opinion). Plaintiffs' remark that Judge Taylor's opinion "represents an appalling

misconception of the values of the area" is a gross insult (plaintiffs' brief, p. 39). The evidence he heard at the trial showed that TVA will spend $500,000 to restore Chota, former capital of the Cherokees. Exhibit 103 shows a model of this restoration. We believe Judge Taylor fully understood this testimony. The proof also showed that TVA will spend another $500,000 to protect Fort Loudoun. Exhibit 97 shows a model illustrating this protection. In addition, the evidence showed that $467,668 has already been expended on archaeological research which the University of Tennessee is conducting by contract with the National Park Service and TVA.

Finally, it is interesting to see what the Cherokee Nation had to say with respect to this matter. It is true, as plaintiffs point out, that the Eastern Band of Cherokee Indians adopted a resolution opposing the project, although no representative of the Eastern Band appeared as a witness at the trial. But it is also true that the Cherokee Nation itself commended TVA for its handling of the project.[4] The testimony showed that the Cherokee Nation appointed a special committee of 40 members to make a thorough investigation of the entire problem. Prior to this investigation, the General

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4 The undisputed evidence at the trial showed that U.S. census figures fix the size of the Eastern Band of Cherokee Indians at about 3,500 individuals, and Dr. Guthe testified that the Cherokee Nation numbers from 66,000 to 80,000 Indians.

Counsel for the Cherokee Nation wrote to plaintiffs' counsel advising him of the formation of the Committee and requesting any information or material which plaintiffs wished to submit to the Committee (copy of letter was filed as Ex. 100 at the trial). Thereafter the Committee filed its report, which was later adopted by the Cherokee Nation, and which states in part:

> 2. Based on the breadth and depth of the facts presented to the Sub-Committee regarding the extent of TVA past and present interest in historical aspects involved, the visiting Cherokee Sub-Committee found no rational basis for further injecting the Cherokee Nation or Cherokee people into the controversial questions involving further development by TVA of the Little Tennessee River basin.
>
> * * *
>
> 4. TVA organization and the University of Tennessee, along with the National Park Service should be commended for efforts to date to explore and develop those identifiable Cherokee historic sites and to recover satisfactory evidences of the Cherokee past.

This report was filed as Exhibit 99 at the trial. Also introduced at the trial as Exhibit 98 was a letter from the General Counsel of the Cherokee Nation to TVA in which he concludes by saying:

> [W]e were much impressed with your determination to properly respect the interest and concern of the Cherokee people.

It is significant that at no time did the Cherokee Nation, or the Eastern Band of the Cherokees, ever suggest that TVA's final environmental statement did not properly or adequately discuss the historical aspects of the former Cherokee villages.

5. Water Quality. Plaintiffs' contention that the EIS does not adequately discuss water quality is utterly without merit, as is their contention that the district court committed error in mistaking quantity of discussion with quality. As to the quantity, the court observed:

> No other topic received the attention, at least quantitatively, as did the water quality aspects of the project [Memorandum, p. 12].

There is no doubt about the accuracy of this statement, for the EIS devotes over 100 pages of the discussion to this subject.

As to the quality of this discussion the record is even more impressive. Plaintiffs presented only one witness, Dr. Thackston, who testified that the discussion was not adequate. TVA presented the testimony of Milo A. Churchill, former Chief of TVA's Water Control Branch, Division of Environmental Research and Development, who holds a master's degree in public health from Johns Hopkins, and Dr. Peter Ashton Krenkel of Vanderbilt University who holds a doctor's degree in sanitary engineering from the University of California at Berkley, and is a world renowned authority in this field. Milo Churchill's qualifications are described in Exhibit 121 and Dr. Krenkel's in Exhibit 122. Both Churchill and Dr. Krenkel contradicted the testimony of Dr. Thackston and testified that the discussion in the EIS was adequate. Dr. Krenkel further testified that TVA's reputation for excellence in the field of water quality is worldwide and is exceeded by none.

The testimony also showed that the organization within TVA having primary responsibility for the preparation of this portion of the EIS is TVA's Office of Health and Environmental Science, which is staffed by over 140 scientists including 20 who hold Ph.D degrees (see Ex. 121). The testimony also showed, as pointed out in the district court's opinion that

> . . . the water quality aspects of the impact statement were reviewed by Dr. Abel Wolman of John Hopkins University and Dr. Robert L. Ball, Director, Office for Research Development, Institute of Water Research, Michigan State University [Memorandum, p. 12].

It is common knowledge that Dr. Abel Wolman is recognized throughout the world as one of the most distinguished authorities in the field of water quality.

In the light of these facts, it is difficult to understand plaintiffs' contention that the district court was confusing quantity with quality.

III

The District Court Did Not Err In Holding that TVA Had Considered All Reasonable Alternatives to the Project.

Plaintiffs' argument that TVA did not consider and adequately discuss in the EIS all reasonable alternatives to the project is without substance. All of plaintiffs' arguments, and the evidence presented in support of them, were rejected by the district court after considering both the EIS

and all of the testimony presented at the four-day trial. Plaintiffs' statement on page 54 of their brief that the testimony of their witnesses was uncontradicted is simply not true. It is difficult to add to what the district court said at pages 16 through 19 of its opinion, which states specifically that it considered all of the alternatives proposed by plaintiffs and that they were either not reasonable alternatives or were adequately discussed in the EIS. Plaintiffs have presented nothing new here, except in effect to ask this Court to accept the testimony of their witnesses over that of TVA's.

The EIS points out that TVA carefully examined the alternatives to the Tellico project prior to the preparation of its draft environmental statement, and then reexamined the entire subject after receiving comments on the draft and prior to issuing its final EIS. This reexamination included "a number of alternatives, including abandonment of the project, recreational development of the water resource as a river rather than a lake, and construction of one or more low dams rather than the one planned" (EIS I-1-1). The evidence showed that TVA considered every alternative suggested by those who commented on the EIS, including specifically Governor Dunn's suggested alternative of abandoning the project and using the area as a scenic river development (EIS I-3-42). TVA responded fully and in detail to this proposal in a seven-page letter copied in full in the EIS (I-3-45 through 51), pointing out,

among other things, that the proposal did not present any new or different factors from those which were fully considered by both TVA and the Congress before construction of the project was commenced in 1967. TVA also noted that Congress at that time had appropriated $35,000,000, and TVA had already spent about $30,000,000 on the project.

In responding to TVA's letter, Governor Dunn, by letter of January 11, 1972, which was filed in evidence as Exhibit 69, conceded:

> You are correct in your statement that the views expressed in my previous letter raised no new questions that had not been previously considered by the Tennessee Valley Authority and others. The intent of my letter was not necessarily to reveal new data, but rather to express a different judgment than that reached by the Tennessee Valley Authority.

Plaintiffs' suggested alternative at the trial, advanced through Governor Dunn's staff members--that the project be abandoned and that the river be developed as a scenic stream solely for recreational purposes--was admittedly what the Governor had already proposed and TVA had already considered and rejected.

As for Dr. Carroll's discussion of the development of an industrial complex at Florence, Alabama, as an alternative, it is sufficient to say that he admitted on cross-examination that such a development would not be a reasonable alternative to the Tellico project in east Tennessee, since it would not be of any benefit to the people of east Tennessee.

Plaintiffs are wrong in stating that Mr. Tully concluded that such industrial development at Florence, Alabama, would be an alternative to the Tellico project (plaintiffs' brief, p. 52). On the contrary, he was saying that "If the development of waterfront industrial sites is, in itself, a desirable or necessary activity . . . ." then "In this regard, the Florence sites are real alternatives." The point he was making is that the Tellico project is much more than the mere development of waterfront industrial sites; it involves navigation, flood control, recreation, electric power, etc., including the enhancement and creation of new jobs in an area of east Tennessee that has suffered for years with unemployment and the lack of job opportunities, which has resulted in the mass out-migration of its young people to other areas.

With respect to flood plain zoning, TVA's proof, including slides introduced as Exhibit 105, was that the area in Chattanooga for which the project would provide major flood protection is already heavily built upon. TVA's proof also showed that both Tellico and levees are needed to provide complete protection at Chattanooga, and levees are therefore not a substitute for Tellico. Flood insurance (if obtainable) obviously is not a substitute for actual protection of a built-up area subject to flooding.

Moreover, Tellico is a half-completed multi-purpose project, which will produce navigation, power, recreation, fish and wildlife, water supply, shoreline development,

redevelopment, and enhanced employment benefits estimated to total almost $7,000,000 per year, exclusive of flood control benefits estimated at $505,000 per year. This clearly distinguishes the Tellico situation from that considered in Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972), which is relied upon by plaintiffs, but which involved merely a channelization project for flood control and drainage purposes only.

The district court heard all the evidence with respect to suggested alternatives and concluded:

> The statement as a whole does give sufficient information concerning all reasonable alternatives for evaluation of their relative merits [Memorandum, p. 19].

NEPA does not require the adoption of a particular alternative, only a consideration and discussion of reasonable alternatives which were available at the time of the project's reevaluation. Natural Resources Defense Council v. Tennessee Valley Authority, 5 ERC 1316 (E.D. Tenn. 1973). With respect to alternatives, NEPA also must be construed in the light of reason. Environmental Defense Fund v. Corps of Eng., 470 F.2d 289 (8th Cir. 1972). As said in Cape Henry Bird Club v. Laird, 5 ERC 1283 (W.D. Va. 1973), aff'd "on the basis of the district court's opinion," ___ F.2d ___ (4th Cir. 1973):

> NEPA however does not require mass studies, and compilations and computations of data for an alternative, the feasibility of which could be determined after only minor study. While the plaintiffs desire detailed studies and collections of such data, the court believes that the Corps need collect only as

> much data as will be necessary for the Corps to determine that the alternative is either infeasible or warrants further attention. NEPA does not preclude an agency from relying on past experience, judgment, and knowledge of the area when it makes a determination about the feasibility of a project's alternatives. If such a determination is made in good faith and without bias, then the collection of voluminous amount of data is unnecessary [5 ERC at 1294].

In considering alternatives, TVA was, of course, justified in taking into consideration the advanced stage of completion of the Tellico project. As said by this Court in upholding the preliminary injunction in the present case:

> [T]he amount of completed construction or investment will certainly affect the ultimate determination whether modifications should be made in the project or whether the project should be abandoned . . . [468 F.2d 1164, 1179 (6th Cir. 1972)].

Similarly, in Environmental Defense Fund v. Corps of Eng., 470 F.2d 289 (8th Cir. 1972), cert. denied, 5 ERC 1416 (1973), the court said:

> Several courts have held that an agency involved in an ongoing federal project may approach the required compliance with § 102 differently from what might be required with respect to new projects. . . .
>
> * * *
>
> . . . We have also taken into account, as we must, that the overall project was authorized by Congress eleven years prior to the passage of NEPA, and was sixty-three percent completed at the date this action was instituted. Almost ten million dollars has been expended and would be lost if the project were completely abandoned now.

> We therefore, affirm the judgment of the trial court for the reasons set forth in the opinion [470 F.2d at 295, 301].

In concluding, we wish to point out, as we have done previously, that the CEQ Guidelines quoted by plaintiffs at page 47 of their brief, were not in effect when the EIS was prepared, and will not be in effect until January 28, 1974.

IV

The District Court Did Not Err in Holding that TVA Had Complied with Section 102(2)(B).

Plaintiffs' witness Dr. Roberts produced computations which he claimed showed a dollar quantification for the environmental loss in the flooding of a former Indian village, and suggested that similar dollar quantifications could be developed for other environmental losses. The district court rejected both the quantification and the implication that an agency is required by NEPA to produce computations for every dollar loss, saying:

> . . . nowhere in Section 102(2)(B) is an agency required to compute in dollar figures every environmental loss. This section merely requires methods and procedures be developed for appropriate consideration of presently unquantified amenities, not the development of a procedure of mathematical equivalence as urged by plaintiffs. This is not to say that if methods exist for more exact evaluation of environmental losses an agency need not adopt them [Memorandum, p. 21].

Plaintiffs' brief (p. 56) now disclaims the position that TVA was obligated to develop dollar quantifications for all environmental losses, and says instead that "the court indicated" that TVA has not developed procedures for consideration of presently unquantified amenities, and that TVA presented no evidence that it had done so.

This is simply not true. The court made no such indication as plaintiffs attribute to it. The court's comments quoted above were obviously directed to Dr. Roberts' testimony. TVA's published procedures for implementing NEPA expressly call for appropriate consideration of unquantified environmental amenities. TVA's General Manager, Lynn Seeber, testified specifically that these TVA procedures were adopted after consultations with CEQ and published in the Federal Register on November 2, 1971 (36 Fed. Reg. 21010) (Exhibit 127). He further testified that before these procedures became effective, CEQ invited comments on them through notice in the Federal Register (36 Fed. Reg. 23666), but received no comments from EDF or any other plaintiff herein. Mr. Seeber also testified that in accordance with these procedures, unquantified environmental amenities were given appropriate consideration in the agency decision making process relating to Tellico. See also Mr. Seeber's affidavit, admitted as Exhibit 125, and his "balancing memorandum," admitted as Exhibit 128.

This, as the district court held, fully meets the requirements of section 102(2)(B) of NEPA.

V

The District Court Did Not Err in Holding that the Federal Water Pollution Control Act Amendments of October 1972 were Inapplicable.

Plaintiffs say (brief, p. 57) that the district court's ruling on this point is inconsistent with its earlier action overruling TVA's motion to dismiss their eighth cause of action dealing with the matter. This is not true. The record shows that after TVA filed a motion to dismiss the complaint, which at the time consisted of six causes of action, plaintiffs were permitted to amend by adding a seventh and eighth cause of action; that TVA answered these counts denying the applicability of this Act; and that accordingly, the court had no occasion to rule on these counts until after the trial.

The court was clearly correct in holding after trial that:

> . . . plaintiffs claim under the Federal Water Pollution Control Act Amendments of 1972 is without merit. We feel that this Act has no application under the facts of this case [Memorandum, p. 26].

Section 313 of the Federal Water Pollution Control Act Amendments of October 1972 (FWPCA) provides in pertinent part:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which

> may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . [33 U.S.C. § 1323 (Supp. II, 1972)].

Other portions of the Act, similarly, show that what it is concerned with is regulating the discharge of pollutants. Section 301 provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful [33 U.S.C. § 1311 (Supp. II, 1972)].

Sections 301(b),[5] 302,[6] 306,[7] and 307[8] provide for setting effluent limitations which, if adhered to, render an otherwise prohibited discharge lawful. Section 318[9] permits certain discharges from aqua-culture projects. Sections 402[10] and 404,[11] respectively, establish permit requirements for the discharge of pollutants from point sources and for the discharge of dredged or fill material into navigable waters. "Discharge" is specifically defined in the Act:

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5 33 U.S.C. § 1311(b) (Supp. II, 1972).
6 33 U.S.C. § 1312 (Supp. II, 1972).
7 33 U.S.C. § 1316 (Supp. II, 1972).
8 33 U.S.C. § 1317 (Supp. II, 1972).
9 33 U.S.C. § 1328 (Supp. II, 1972).
10 33 U.S.C. § 1342 (Supp. II, 1972).
11 33 U.S.C. § 1344 (Supp. II, 1972).

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft [§ 502(12), 33 U.S.C. § 1362(12) (Supp. II, 1972)].[12]

While heat "discharged into waters' is defined as a pollutant in section 1362(6), and while the evidence and the EIS showed that the water temperature of the Tellico Reservoir would be increased, the uncontradicted evidence was that this would be the result of the natural warming of the water by the earth and sun and is not heat "discharged into water." Consequently, as the district court held, the Act has no application to the facts of this case.

VI

The District Court Did Not Err in Holding that TVA Has Complied with the National Historic Preservation Act.

Plaintiffs alleged in their amended complaint that TVA failed to comply with the National Historic Preservation Act with respect to Fort Loudoun, which was the only structure

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12 Senator Muskie, chief sponsor of the 1972 Amendments in the Senate, said in an analysis of the conference amendment, "The term 'discharge' is a word of art in the legislation. It refers to the actual discharge from a point source into the navigable waters, territorial seas or the oceans" (118 Cong. Rec. S16876 (daily ed. Oct. 4, 1972)).

in the project area on the National Register at the time the EIS was filed. The undisputed proof at the trial showed that TVA had complied with this Act and the court so found, saying:

> Both the EIS and the evidence show that TVA is in full compliance with this Act. As to the indian villages nominated on August 30, 1973 for inclusion in the National Register, TVA has not yet had the opportunity to comply with the Act but stated at trial it fully intended to do so [Memorandum, p. 26].

The evidence at the trial was that, due in part to the efforts of plaintiffs' counsel, the two former Cherokee village sites mentioned by the court were nominated and included on the National Register approximately two weeks before trial. TVA's General Manager testified that TVA had not yet had an opportunity to respond to the nominations and follow the administrative procedures involved, but that it would do so according to the proper administrative procedures.[13]

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13 The district court found, with respect to all of the former Indian village sites, including specifically the two sites nominated on August 30, 1973, that TVA, in compliance with NEPA, had fully taken into account, and adequately discussed the impact of the project upon such sites. The National Historic Preservation Act requires essentially only the same, so that compliance with NEPA is automatic compliance with that Act. See Environmental Defense Fund v. Corps of Eng., 325 F. Supp. 749, 754 (E.D. Ark. 1971), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 5 ERC 1416 (1973); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972); Environmental Defense Fund v. Corps of Eng., 348 F. Supp. 916, 921-22, n.4 (N.D. Miss. 1972). Also, the evidence before the district court was undisputed that although both the draft and final EIS were sent to the National Advisory Council on Historic Preservation and the State of Tennessee, neither commented with respect to any of the former village sites.

Plaintiffs in their brief (p. 61) now interpret the district court's memorandum as holding "that TVA had not complied with the Act" as to the two Indian villages. Their position appears to be that if sites can be added on the eve of trial, as to which TVA has had no opportunity to take the required statutory steps, TVA is thereby put in violation of the Act and it must be presumed, in the face of direct testimony to the contrary, that TVA will not comply with it in the future. We do not consider that such an argument requires any response.

VII

The District Court Correctly Dismissed Plaintiffs' Claim Based on the Ninth Amendment.

Plaintiffs' "Fifth Cause of Action," which the court dismissed, was a claim that the Fifth and Ninth Amendments to the Constitution of the United States in effect prohibit the building of Tellico Dam because it would infringe upon plaintiffs' right to enjoy the environment in its natural state--free from governmental disturbance. No case has ever held that such claim has any validity. On the contrary, every court that has considered the claim has summarily rejected it, which fact plaintiffs conceded below. In addition to the present action, identical claims were made, and dismissed, in Environmental Defense Fund v. Corps of Eng., 325 F. Supp. 728, 739 (E.D. Ark. 1971), aff'd, 470 F.2d 289

(8th Cir. 1972), cert. denied, 5 ERC 1416 (1973); Environmental Defense Fund v. Tennessee Valley Authority, 4 ERC 1892-94 (E.D. Tenn. 1972); Environmental Defense Fund v. Corps of Eng., 348 F. Supp. 916, 921 n.4 (N.D. Miss. 1972); and United States v. 247.37 Acres, 3 ERC 1098, 1102 (S.D. Ohio 1971). See also Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972).

VIII

The District Court Did Not Err in Denying Plaintiffs Costs and Attorney Fees.

Rule 54(d) of the Federal Rules of Civil Procedure provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

The district court followed this statute by awarding plaintiffs their costs through the preliminary injunction, as to which they had prevailed, and by awarding TVA its costs for the balance of the case, as to which it had prevailed.

Plaintiffs say that this allocation of costs was improper but do not say why. Their primary argument is that they should have been awarded attorney fees, which the district court denied. Here again, the applicable statute--28 U.S.C. § 2412--is very specific:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency . . . of the United States . . . .

Plaintiffs' basic contention is that this statutory provision is inapplicable because TVA is not an "agency of the United States." This contention is without substance. Section 19 of the TVA Act specifically characterizes TVA as "an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers."[14] Its status as such an agency of the United States has been recognized time and again by the courts. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 315 (1936) ("an agency of the Federal Government"); Tennessee Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 134 (1939) ("an instrumentality of the United States"); United States v. An Easement and Right-of-Way, Etc., 246 F. Supp. 263, 269 (W.D. Ky. 1956), aff'd "for the reasons stated and upon the authorities set forth in the opinion of the district court," 375 F.2d 120, 121 (6th Cir. 1967) ("a wholly-owned corporate agency and instrumentality of the United States"); Posey v. Tennessee Valley Authority, 93 F.2d 726, 727 (5th Cir. 1937) ("plainly a governmental agency of the United States").

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14 16 U.S.C. § 831r.

Moreover, 28 U.S.C. § 451 specifically defines "agency" for purposes of Title 28 generally as follows:

> The term "agency" includes any . . . corporation in which the United States has a proprietary interest . . .

This certainly includes TVA.

The cases cited by plaintiffs are wholly inapposite. None of them allowed an award of attorneys' fees against a government agency except Natural Resources Defense Council v. Environmental Protection Agency, 5 ERC 1891 (1st Cir. 1973), involving the Clean Air Act which, unlike NEPA, expressly permits assessment of attorneys' fees against agencies of the United States. As the court there expressly stated:

> To award attorneys' fees against a governmental agency, we must first find that Congress has given specific statutory sanction. Here, we find such sanction in the language of the Clean Air Amendments themselves [p. 1893].

With respect to the two TVA cases cited by plaintiffs, United States ex rel. TVA v. Pressnell, 328 F.2d 580 (6th Cir. 1964), had nothing to do with attorneys' fees nor TVA's status as a federal agency under 28 U.S.C. § 451 or § 2412. Natural Resources Defense Council v. Tennessee Valley Authority, 459 F.2d 255 (2d Cir. 1972), did not hold that TVA was not a federal agency; rather, it held that the legislative history of the venue provisions of 28 U.S.C.

§ 1391(e) showed that it was intended to apply solely to federal agencies previously suable only in the District of Columbia, and that TVA was not that "sort of federal agency" (p. 259).

This case is directly in point, however, on the cost question raised by plaintiffs since the Second Circuit allowed costs to TVA as the prevailing party against the environmental organizations (including EDF) there involved, and specifically denied a motion by these organizations that TVA's costs not be assessed against them but that each party bear its own costs. A copy of the court's order on this point is attached.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was served on plaintiffs-appellants by mailing a copy to Messrs. Duncan, Brown, & Palmer, 1700 Pennsylvania Avenue, N.W., Washington, DC 20006, this 28th day of November, 1973.

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Attorney for Defendants-
Appellees

COPY

72-1119

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of April, one thousand nine hundred and seventy-two.

Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., and Sierra Club,

Plaintiffs-Appellees,

v.

Tennessee Valley Authority and Aubrey J. Wagner, Chairman Tennessee Valley Authority,

Defendants-Appellants,

National Audubon Society, Inc.,

Intervenor

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated April 10, 1972, for an order that costs not be taxed against appellees but instead be borne by each side as incurred or, in the alternative, for leave to file a petition for rehearing be and it hereby is denied

/S/ Henry J. Friendly
HENRY J. FRIENDLY, Chief Judge

/S/ William H. Timbers
WILLIAM H. TIMBERS

/S/ William J. Jameson
WILLIAM J. JAMESON, Circuit Judges